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ALEXANDER L. STEVAS
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No. 83-727

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAMAR ALEXANDER, ET AL., PETITIONERS

v.

ROSIER JENNINGS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

CHARLES J. COOPER
Deputy Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MICHAEL CARVIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

48 pp

QUESTION PRESENTED

The United States will address the following question:

Whether a 14-day annual limit on Medicaid coverage for inpatient hospital care has a "disparate impact" on the handicapped if a disproportionate number of handicapped Medicaid-eligible hospital users require more than 14 days of such care.

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INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcing Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) in connection with federally assisted programs and activities.[1] This case concerns the interpretation of that Section and its implementing regulations,[2]

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[1] In 1976 the President directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11,914, 41 Fed. Reg. 17871 (1976). The Secretary issued detailed regulations. 45 C.F.R. Pt. 85 (1978). In 1980 the Secretary's responsibility was transferred to the Attorney General (Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980)), and the regulations were "deemed to have been issued by the Attorney General." *Id.* at 72997; see 28 C.F.R. Pt. 41. The regulations require each federal agency to issue its own regulations concerning handicap discrimination in the programs and activities financially assisted by that agency. 28 C.F.R. 41.4.

[2] At least 24 federal agencies have regulations which incorporate a "disparate impact" test. See 5 C.F.R. 900.704(b)(3) (OPM); 7

and the outcome will directly affect the actions of numerous federal agencies and recipients of federal funds. For the same reason, the United States has participated as amicus curiae in other cases before this Court involving Section 504. See *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984).

STATEMENT

1. This suit was brought by Medicaid recipients from the State of Tennessee to challenge an array of changes proposed by the State to control its Medicaid expenditures. By the time of the district court's decision (Pet. App. A27-A51), the only remaining issue was the validity of Tennessee's proposed reduction in the number of hospital days covered by Medicaid from 20 to 14 per year. Although the validity of this proposed reduction was challenged on several grounds, the questions presented on certiorari concern its propriety only under Section 504 of the Rehabilitation Act.[3]

At trial, statistical evidence was submitted comparing inpatient hospital use by individuals who qualify for Medicaid benefits on the basis of blindness or disability (deemed "handicapped" by the parties and by the court

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C.F.R. 15b.4(b)(4) (DOA); 10 C.F.R. 4.121(b)(4) (NRC); 10 C.F.R. 1040.63(b)(4) (DOE); 14 C.F.R. 1251.103(b)(5) (NASA); 15 C.F.R. 8b.4(b)(4) (DOC); 18 C.F.R. 1307.4(b)(3) (TVA); 22 C.F.R. 142.4(b)(4) (DOS); 22 C.F.R. 217.4(b)(4) (AID/IDCA); 28 C.F.R. 41.51(b)(3), 42.503(b)(3) (DOJ); 29 C.F.R. 32.4(b)(4) (DOL); 31 C.F.R. 51.52(b)(1)(vi), 51.55(b)(1)(viii) (D. Treas. (ORS)); 32 C.F.R. 56.8(a)(6) (DOD); 34 C.F.R. 104.4(b)(4) (D. Ed.); 38 C.F.R. 18.404(b)(4) (VA); 49 Fed. Reg. 1656 (1984) (to be codified at 40 C.F.R. Pt. 7) (EPA); 41 C.F.R. 101-8.303(d) (GSA); 43 C.F.R. 17.203(b)(4) (DOI); 45 C.F.R. 84.4(b)(4) (HHS); 45 C.F.R. 605.4(b)(4) (NSF); 45 C.F.R. 1151.17(c) (NEA); 45 C.F.R. 1170.12(c) (NEH); 45 C.F.R. 1232.4(b)(3) (ACTION); 49 C.F.R. 27.7(b)(4) (DOT).

[3] Respondents argued below that the proposed reduction also violated the Social Security Act and its implementing regulations (Pet. App. A43-A51).

(J.A. 40)) with inpatient hospital use by individuals who qualify for Medicaid benefits on the basis of other considerations (deemed "nonhandicapped").[4] The district court found that during fiscal year 1979-1980, 341,960 persons qualified for Medicaid benefits in Tennessee. Of these 90,668 (26.5%) were handicapped. During the same period 51,140 Medicaid recipients used one or more days of inpatient hospital care. Of these 16,852 (33.0%) were handicapped (Pet. App. A31-A32).[5] Out of the 7279 Medicaid recipients who needed more than 14 days of hospital care, 4617 (63.4%) were handicapped (J.A. 170-172, 182-184).

Looking at those figures another way, respondents noted that of the Medicaid recipients who used inpatient hospital care, 92.2% of the nonhandicapped (31,626 ÷ 34,288) would have been fully served by 14 days of coverage, whereas only 72.6% of the handicapped (12,235 ÷ 16,852) would have been fully served. Thus 27.4% of the handicapped users of this service, as opposed to 7.8% of the nonhandicapped users, required some hospitalization for which they would not be reimbursed if the 14-day limit went into effect. On the basis of these statistics respondents argued that the 14-day limit would have a disparate impact on the handicapped, and that they had therefore shown a prima facie violation of Section 504.

The district court rejected this argument. It held (Pet. App. A34-A35) that the proportionately greater hospital use by handicapped Medicaid eligibles in fiscal year 1979-1980 was not necessarily attributable to their handicaps, and that the 1979-1980 statistics therefore showed little about likely future hospital use.[6] In any event, the court

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[4] The pertinent eligibility criteria for Medicaid benefits are described at page 6, *infra*. For further comment on the question of who are the "handicapped" see note 13, *infra*.

[5] Thus 18.6% of all handicapped Medicaid recipients (16,852 ÷ 90,668) used inpatient hospital care, while 13.6% of nonhandicapped recipients (34,288 ÷ 251,292) used this service.

[6] The court said (Pet. App. A34 n.6):

> For example, there was no attempt to show what percentage of handicapped users required inpatient hospital treatment as

held that the disparity shown by respondents "[did] not amount to discrimination" under Section 504 (Pet. App. A40).

On appeal the Sixth Circuit vacated and remanded for further proceedings, holding that respondents had shown a disparate impact, and therefore established a prima facie case (Pet. App. A1-A19). Citing medical testimony describing the inpatient hospitalization patterns of patients with various handicaps,[7] the court found to be clearly erroneous the district court's finding that the disparity demonstrated for 1979-1980 might not continue in later years (Pet. App. A10-A12).[8] The court further held that that disparity sufficed to establish a prima facie case, stating (Pet. App. A9-A10):

> [T]he district court erred by confusing the prima facie case with a decision on the ultimate outcome. * * * The establishment of disparate impact is not determinative of whether the defendant is guilty of discrimination. It merely requires the defendant to rebut the inference of discriminatory action. * * * [T]he showing of disparate impact proved a prima facie case and required the state to explain its choice.

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a result of their handicapping condition. It seems likely that some handicaps, such as blindness, would rarely require hospitalization, while others, such as mental illness, might well require frequent hospitalization. Without some such evidence, the court is left to speculate on what extent the existence of handicaps in the broad sense of § 504 affects the statistical disparity shown for the study year.

The court also pointed out (*ibid.*) that even in 1979-1980 only 5% of all handicapped Medicaid eligibles (27.4% × 18.6%) needed more than 14 days of inpatient hospital care. The corresponding figure for nonhandicapped Medicaid eligibles was 1% (7.8% × 13.6%).

[7] The State also admitted in its appellate brief that "the handicapped population of Medicaid recipients would suffer proportionately more from the reduction in hospital benefits than the nonhandicapped Medicaid recipients" (see Pet. App. A11 n.7).

[8] The court "disagree[d]" (Pet. App. A10) with the district court's finding that the evidence did not indicate the extent to which the existence of handicaps affects the statistical disparity.

The court went on to consider the justification offered by the State for its proposed reduction in inpatient hospital coverage (Pet. App. A12-A16). The court found that the State "was justified in attempting to reduce its Medicaid expenses" (Pet. App. A13). It noted, however, that respondents—in addition to proving a prima facie case of disparate impact—had presented an alternative plan that might have affected the handicapped less while still reducing the State's expenses.[9] The court held that under these circumstances the State must rebut the prima facie case either by "demonstrat[ing] that the alternative method * * * will not accomplish the State's objective of cost-saving," [10] or by "coming forward with some substantial justification for the adoption of the plan with the greater discriminatory impact" (Pet. App. A16).[11]

2.a. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) provides:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

A "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which sub-

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[9] As the district court indicated (Pet. App. A36 n.7), respondents' plan would have limited inpatient hospital coverage on a per-stay basis rather than a per-year basis. The court of appeals' characterization of the plan as "limiting the total number of visits per annum rather than the number of days" (Pet. App. A13) is incorrect. Respondents proposed that a fixed number of days be allowed for each type of hospital stay (*e.g.*, appendectomy, coronary bypass surgery), based on a fixed percentage (whatever was needed to keep the total cost within the State's budget) of the average number of days needed for stays of that nature. See Br. in Opp. 3 n.1; J.A. 59-61, 98-107, 120-121; C.A. App. 320-329.

[10] We assume that demonstrating that the alternative method does not really have a lesser disparate impact on the handicapped would also suffice to rebut the prima facie case.

[11] Judge Merritt dissented (Pet. App. A20-A26).

stantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. 706(7)(B)). HHS regulations implementing Section 504 define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (45 C.F.R. 84.3(j)(2)(ii)).

b. Title XIX of the Social Security Act (see 42 U.S.C. (Supp. V) 1396a(a)(10)) ties eligibility for Medicaid benefits to eligibility for either Supplemental Security Income (SSI) (42 U.S.C. 1381 *et seq.*) or Aid to Families with Dependent Children (AFDC) (42 U.S.C. (& Supp. V) 601 *et seq.*). It is thus essentially limited to five categories of individuals: (1) the blind; (2) the disabled; (3) the aged (65 or older); (4) dependent children (generally under age 18) deprived of parental support; and (5) caretaker-relatives of such children.[12] Eligibility is also limited by financial and other considerations, but no one, regardless of income, is eligible for Medicaid unless he falls into one of these five categories.

A person is "disabled" for purposes of SSI and Medicaid eligibility "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" (42 U.S.C. 1382c(a)(3)(A)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question we address in this brief is whether Tennessee's 14-day limit on Medicaid coverage for inpatient hospital care has a disparate impact on the handicapped[13]

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[12] The first three categories are SSI eligibles; the last two are AFDC eligibles.

[13] As we mentioned above, throughout this litigation the term "handicapped Medicaid eligibles" has been used to describe the blind and disabled, and "nonhandicapped Medicaid eligibles" to describe all others. But as the statutory definitions show, while the blind and the disabled *are* "handicapped" for purposes of Section

so as to constitute a prima facie violation of Section 504 of the Rehabilitation Act.

The petition presents as a separate antecedent question whether "a 'disparate impact' or 'effects' test [is] appropriate to determine a violation of § 504 of the Rehabilitation Act of 1973 and regulations issued thereunder" (Pet. i). This issue was not briefed, argued, or decided in either the district court or the court of appeals. Our brief in this case proceeds on the assumption that a showing of "disparate effects" could, in a proper case, constitute a prima facie violation of Section 504—either because Sec-

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504, it does not follow that persons who qualify for Medicaid on some other basis are *not*. The class of "handicapped" persons protected by Section 504 is in fact much broader than the class of "disabled" persons eligible for Medicaid benefits. Section 504 protects people fully capable of engaging in "substantial gainful activity" (42 U.S.C. 1382c(a)(3)(A)), who have either (i) a physical or mental impairment (or a *record* of such an impairment) which is *regarded* as limiting their ability to work, or (ii) a physical or mental impairment (or a *record* of such an impairment) which substantially limits (or is *regarded* as limiting) some *other* "major life activit[y]." 29 U.S.C. 706(7)(B). Thus, for example, dyslexic and hearing-impaired AFDC recipients would be "handicapped" under Section 504, but would have been included in the class of "nonhandicapped Medicaid eligibles" in the statistics used here. Had they instead been included among the "handicapped Medicaid eligibles," the proof might have been significantly different. If their handicaps do not require much hospital care, the percentage of the handicapped requiring more than 14 days would have been lower than 27.4% (since the denominator would have been larger), and the percentage of the nonhandicapped would have been higher than 7.8% (since the denominator would have been correspondingly smaller).

As a result, we think that the court of appeals' decision (quite apart from any legal error) rests on an erroneous factual premise—that it is "the handicapped" *as defined in the Rehabilitation Act* who are disproportionately affected by Tennessee's plan. If the Court should disagree with our principal contention (pages 10-30, *infra*), it may nonetheless wish to consider vacating the judgment below and remanding to the court of appeals with instructions to remand to the district court for further findings of fact that are consistent with the definition of "handicapped individual" set forth in 29 U.S.C. 706(7)(B).

tion 504 itself may encompass "disparate effects," [14] or because the numerous agency regulations implementing Section 504—which prohibit recipients from using criteria that have the "purpose *or* effect" of discriminating against the handicapped [15]—may constitute a valid means of implementing the open-ended statutory directive. See *Guardians Association* v. *Civil Service Commission*, No. 81-431 (July 1, 1983).

However, we do not think that the Court needs to pass on the validity of either of these assumptions, or to revisit the question that so troubled the Court in *Guardians* under the parallel provisions of Title VI—the role of purpose and effect in interpreting the statute and the regulations. As we demonstrate below, Tennessee's plan does not have a disparate impact on the handicapped even if one assumes that an "effects" test is proper. A finding of disparate impact depends on a showing that the handicapped are affected unequally with respect to some relevant good or benefit. In this case Tennessee has provided the same good or benefit (hospital care up to 14 days) to all individuals eligible for Medicaid (pages 11-12, 16-21, *infra*).

Should the Court reject our principal contention, and conclude that the facts here can constitute a showing of disparate impact, two questions would still remain to be decided. The first is whether such a showing is legally sufficient to establish a prima facie case under Section 504 and its regulations. The second is whether, if it is, the State here successfully rebutted the respondents' showing.[16] We suggest that the appropriate disposition of both of these questions would be to remand them for determination in the first instance by the lower courts, where they have not yet been considered.

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[14] This Court has not considered whether the differences in statutory language and legislative history between Title VI and Section 504 would require a different result here than the Court reached in *Guardians Association* v. *Civil Service Commission*, No. 81-431 (July 1, 1983), on this question.

[15] See page 14, *infra*.

[16] See note 17, *infra*.

We turn then to the court of appeals' conclusion that the State's proposed 14-day limit on Medicaid coverage for inpatient hospital care would have a disparate impact on the handicapped, and that respondents had therefore made out a prima facie case under Section 504. This conclusion is erroneous.

A. Respondents' showing of "disparate impact" is legally insufficient because the State plan offers the same benefit to all Medicaid eligibles, handicapped and non-handicapped alike. The court of appeals' conclusion that the handicapped are affected "more harshly than others" (Pet. App. A8) rests on the assumption that the benefit Tennessee is conferring is not a fixed amount of health services, but the satisfaction of health needs. That assumption is incorrect.

Section 504 does not dictate what kind of benefit a recipient of federal funds must provide. It simply commands that the handicapped be allowed to share equally in the benefits of a federally assisted program, whatever those may be. What those benefits are is in the first instance determined by the federal fund recipient (here the State), which is the entity that has chosen to undertake the program or activity of distributing those benefits. That determination must, of course, be consistent with the federal funding statute (here the Medicaid Act) that subsidizes the recipient's program or activity. Here all the State has undertaken is to give Medicaid eligibles inpatient hospital services up to 14 days. Such a limitation on hospital care is fully consistent with the Medicaid Act, which defines "medical assistance" as "payment of part * * * of the cost of * * * care and services." 42 U.S.C. (Supp. V) 1396d(a). Indeed the Medicaid Act includes its own equality provision (one more specific than Section 504), which says only that "the medical assistance made available to any individual * * * shall not be less in *amount, duration, or scope* than the medical assistance made available to any other * * * individual." 42 U.S.C. (Supp. V) 1396a(a)(10) (emphasis added).

B. The court of appeals appears to have thought that Section 504, while leaving a recipient free to choose "the

goal of [its] program" (Pet. App. A12 n.8), requires funds to be allocated so that the handicapped and non-handicapped are equally successful in achieving that ultimate goal.

1. This suggestion dissolves all distinction between nondiscrimination and affirmative action. It may be that a greater percentage of the handicapped require more than 14 days of hospital care to achieve the ultimate goal of good health. But the same would be true if the State reverted to a 20-day limit. The only way to assure equality in reaching the goal of good health is to allocate more health care money per capita to the handicapped. Section 504—an antidiscrimination (rather than an affirmative action) statute—does not mandate such a redistributive subsidy. Indeed, such a redistribution may well have a disparate impact on other groups protected by other antidiscrimination laws.

2. An approach requiring equality of results is unsupported by the case law dealing with Section 504 and cognate statutes. In *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), this Court made clear that discrimination against the handicapped should be measured in the context of the "program" as defined by the recipient of federal funds. It also held that "[t]he language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. * * * Section 504 does not refer at all to affirmative action." 442 U.S. at 410.

ARGUMENT

TENNESSEE'S 14-DAY LIMIT ON INPATIENT HOSPITAL CARE FOR ALL MEDICAID RECIPIENTS DOES NOT HAVE A DISPARATE IMPACT ON THE HANDICAPPED, AND SO IS CONSISTENT WITH SECTION 504 AND ITS IMPLEMENTING REGULATIONS

According to the court of appeals, respondents demonstrated that the State's proposed 14-day limit on Medicaid

coverage for inpatient hospital care would have a disparate impact on the handicapped, and therefore established a prima facie case under Section 504.[17] This conclusion is erroneous.

A. Tennessee's Plan Does Not Have A Disparate Impact Because The Relevant Benefit (Hospital Services) Is Provided Equally To Handicapped And Nonhandicapped Alike

The court of appeals held that Tennessee's plan was "a facially neutral policy which affected [the] protected group[] more harshly than others" (Pet. App. A8). But in one obvious way the State's plan affects everyone equally: all Medicaid recipients are entitled to 14 days of hospital care; none is entitled to more. The court's conclusion is meaningful only if one assumes that the rel-

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[17] Application of a disparate impact test, in cases where it is appropriate, typically involves three steps: (1) the plaintiff must establish that the challenged act or practice has a disproportionate adverse effect on a protected class; (2) the defendant must then demonstrate that the act or practice has a "manifest relationship" to a legitimate interest; (3) "[e]ven in such a case, * * * the plaintiff may prevail if he shows that the [defendant] was using the practice as a mere pretext for discrimination." *Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971)(Title VII). See also *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322, 1334-1335 (3d Cir. 1981) (en banc) (Title VI); *Bryan* v. *Koch*, 627 F.2d 612, 616-619 (2d Cir. 1980) (Title VI).

As we show below, this case is unlike the typical disparate impact case because the very existence of a disparity depends on how one defines the benefit that respondents are deprived of. If the benefit is properly defined as the provision of inpatient hospital services, then the handicapped are affected in precisely the same way as other Medicaid eligibles—under the State's proposal, everyone is subject to the identical 14-day limit on these services. To require the State to justify its 14-day limitation under these circumstances is to proceed to step (2) of the inquiry before the plaintiffs have made out a prima facie case under step (1). In the circumstances of this case it is thus part of the plaintiffs' initial burden to establish that the relevant benefit is something other than what the State maintains it is.

evant "good" or "benefit" [18] being distributed (and as to which a discriminatory effect is prohibited) is not the provision of health services, but the satisfaction of health needs.

How does one determine what is the relevant "good" or "benefit"? Our submission is that the answer cannot be derived from Section 504 itself. Section 504 was not intended to generate an independent substantive definition of what is the federally subsidized good or benefit as to which discrimination is prohibited. Rather, it is the recipient—here the State—that in the first instance must determine what benefit-distributing program or activity it wishes to undertake. (In this case we believe that Tennessee has undertaken a program of distributing, not satisfaction of health needs, but hospital care.) Of course, because the federal grant statute subsidizes the recipient's program or activity, the recipient's choice of benefits must be consistent with that federal law. (Here Tennessee's decision to distribute, as a benefit, up to 14 days of hospital care is fully consistent with the Medicaid Act.) The purpose of Section 504 is simply to assure that qualified handicapped individuals are given an equal opportunity to share in those benefits that the recipient has undertaken to distribute and the federal government has undertaken to subsidize.

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[18] Section 504 states that qualified handicapped individuals may not be "excluded from the participation in, be denied the *benefits* of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (emphasis added). As this Court's decision in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 520 (1982), demonstrates, one may be "subjected to discrimination"—*e.g.*, in employment—even though he does not "directly benefit from federal grants, loans, or contracts." See also *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984). In this case, however, respondents' very claim is that the State has not given them their proper share of the good being handed out in a federally subsidized "benefit program." It is therefore appropriate to analyze the case as raising the question whether the relevant *benefit* is the provision of hospital services, or rather the satisfaction of health needs.

1. *Section 504 Does Not Dictate What Kind Of Benefit The State Must Provide*

Like the notion of equality itself,[19] Section 504 generates no self-contained or independent substantive rule of conduct. It states that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (29 U.S.C. 794). Nothing in that language defines or even constrains the kind of "program or activity" a recipient may conduct, or what its "benefits" may be. It presumes that the program may be of "any" kind the federal government is willing to assist. Once the recipient has established a program and complied with the requirements for federal aid, however, Section 504 commands that the handicapped be given an equal opportunity to share in its benefits, whatever they may be.

Suppose Tennessee were to decide that it wished to give each of its citizens $100, to be spent on health care, and the federal government decided to contribute $70 per person for this program. Section 504 obviously requires that the handicapped, like everyone else, receive $100; but it would hardly be thought that the program was (prima facie) invalid under Section 504 because $100 may buy less "good health" for the handicapped than for the nonhandicapped. Similarly, if the State decides to offer specific health services, Section 504 simply insists that the handicapped have equal access to *those* services, not that those services produce equivalent *results* for the handicapped.

The Section 504 regulations (to which the court of appeals referred (Pet. App. A12 n.8)) are consistent with this understanding of the role of Section 504. 45 C.F.R. 84.4(b)(2) provides that

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[19] The term "equality" expresses a relation—the idea that some person or thing (X) is equal to another (Y) in some attribute (Z). What that attribute (Z) might be is determined not by the idea of equality but by some external system that makes it relevant.

> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.[20]

Under this section, the handicapped must be given an "equal opportunity" to get "the same benefit" (whatever that may be) that the State offers to others. The explanatory appendix to the regulations illustrates what is meant by such an "equal opportunity" (45 C.F.R. Pt. 84 App. A, ¶ 6):

> For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients.

The other provision referred to by the court of appeals (Pet. App. A8 & n.5, A12 n.8) was 45 C.F.R. 84.4(b)(4), which states:

> (4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons * * *.

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[20] Section 84.4(b)(2) explains and qualifies 45 C.F.R. 84.4(b)(1)(iii), which states that

> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> * * * * *
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others * * *.

Clause (i) speaks of discriminatory "effect," but like the statute, it says nothing about the kinds of benefits whose uneven distribution will have that result. Clause (ii) refers to the "*recipient's* program"; that program's "objectives" are assumed to have been defined by the recipient outside the framework of Section 504.

Thus Section 504 leaves a recipient of federal funds free to decide the kind of benefit it wishes to offer and the objectives of its program. The federal grant statute determines whether a program distributing that benefit is entitled to a federal subsidy. And Section 504 comes into play at the next step: whatever benefit *is* offered, and has been subsidized, must be made available to the handicapped on equal terms with the nonhandicapped. The explanatory appendix gives the following examples:

> Recipients are not required * * * to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

45 C.F.R. Pt. 84 App. A, ¶ 33.

> One common misconception about the regulation [21] is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

45 C.F.R. Pt. 84 App. A, ¶ 36. A third discusses the regulation (45 C.F.R. 84.53) forbidding discrimination in the treatment of drug and alcohol addicts:

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[21] The regulation referred to is 45 C.F.R. 84.52(a), which specifically addresses discrimination against the handicapped in the provision of health, welfare, and other social services.

> This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

45 C.F.R. Pt. 84 App. A, ¶ 37.

In this case the court of appeals found it significant that Tennessee's plan, by limiting coverage to 14 days, would not "afford the best cure" (Pet. App. A12 n.8) for some sufferers of "asthma, emphysema, chronic bronchitis," and "'[d]egenerative diseases of neurology'" (*id.* at A11). But that is no different from saying that the State has not chosen to pay for treatment of drug addiction or alcoholism, or for major disorders in general, or for anything other than burn treatment. Section 504 does not require the State to treat those conditions at all. A fortiori it does not require the State to provide more than 14 days of hospital care for them, particularly when it does not do so for other conditions.[22]

2. *Tennessee Law And The Medicaid Act Contemplate That The Relevant Benefit (The Provision Of Health Services) May Be Subject To A Reasonable Annual Limit*

The court of appeals apparently believed that Tennessee law and the Medicaid Act do not contemplate a benefit program of health services subject to a flat annual maximum. It held that it (Pet. App. A12 n.8):

> would be too simplistic an analysis to hold that all the Medicaid program requires is a particular number of days in the hospital. Rather, it is likely that

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[22] Other cases dealing with claims like respondents' have understood this point. See, *e.g.*, *Doe* v. *Colautti*, 592 F.2d 704, 707-710 (3d Cir. 1979) (state may limit the number of days it will pay for hospitalization in a private mental institution, though it provides unlimited hospitalization for physical illness); *Doe* v. *Devine*, 545 F. Supp. 576, 585 (D.D.C. 1982), aff'd on other grounds, 703 F.2d 1319 (D.C. Cir. 1983) (reduction of inpatient mental health benefits below the levels for physical illness).

> the objective is to afford the best cure, therapy, or preventative treatment that the allotted funds can provide.[23] This is made clear by the Tennessee law defining medical assistance as the "payment of the cost of care, services and supplies necessary to prevent, diagnose, correct or cure conditions in the person." Tenn. Code Ann. § 14-23.103(2).

Nothing in Tennessee law, however, suggests that the State has chosen to distribute anything other than a limited amount of health services. On the contrary, Tennessee law specifically empowers "[t]he commissioner [of public health] * * * by rule and regulation [to] fix the maximum level of services as are deemed necessary to insure that an expenditure of state funds shall not exceed the amount provided for those purposes." Tenn. Code Ann. § 14-23-109 (1980). Pursuant to this provision, the commissioner had previously limited coverage to 20 days for all Medicaid recipients. By the reduction at issue in this case he proposed, pursuant to the same authority, to offer needed care up to 14 days—nothing more, nothing less.

The court of appeals also said that it "would be too simplistic * * * to hold that all the Medicaid program

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[23] The meaning of this is somewhat obscure. Obviously, if "the allotted funds" are limited, the State cannot pay for cures in all cases. And curing those who can be healed in 14 days—with substantial help (14 days of care) for those who cannot—is certainly one way of defining "the best cure * * * the allotted funds can provide." Another way of distributing funds might be that proposed by respondents: paying a percentage of each person's stay in the hospital, with no limit on the number of stays. That would not provide a cure in any case (since the percentage must be less than 100% if funds are limited), but would give the most seriously ill (people needing more than 14 days of care) the same percentage of their costs as the least seriously ill. The court of appeals seems to have envisioned a third possible scheme: an annual limit on the number of stays, but no limit on the number of days per stay (Pet. App. A13-A14). This would provide cures in some cases (patients who had not used up their allotted number of stays), but not in all. Whether those uncured would number more than 7279 (the number of people needing more than 14 days of care) is not apparent from the record.

requires is a particular number of days in the hospital" (Pet. App. A12 n.8). We disagree. Both Title XIX of the Social Security Act (42 U.S.C. (& Supp. V) 1396 *et seq.*) and the Medicaid regulations (42 C.F.R. Pt. 430 *et seq.*) envision precisely that kind of limitation.[24] Section 1901 of the Act provides for grants to states "[f]or the purpose of enabling each State, *as far as practicable under the conditions in such State*, to furnish * * * medical assistance" (42 U.S.C. 1396 (emphasis added)). "[M]edical assistance" is defined as "*payment of part* or all *of the cost* of * * * care and services" (42 U.S.C. (Supp. V) 1396d(a) (emphasis added)). Section 1902 of the Act requires state plans to "include *reasonable* standards * * * for determining * * * *the extent* of medical assistance under the plan" (42 U.S.C. 1396a(a)(17) (emphasis added)).

Tennessee's proposal is also consistent with the equality rule incorporated in Section 1902(a)(10) of the Medicaid Act. That section is far more specific than Section 504 about the kind of Medicaid benefits the blind and disabled are entitled to get on equal terms with others. It states (42 U.S.C. (Supp. V) 1396a(a)(10) (emphasis added)):

> (a) A State plan for medical assistance must—
>
> * * * * *
>
> (10) provide—
>
> * * * * *
>
> (B) that the medical assistance made available to any individual described in clause (A)[25]—

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[24] We note that Section 504 regulations must "be consistent with achievement of the objectives of the statute authorizing the financial assistance." 42 U.S.C. 2000d-1; 29 U.S.C. 794a(a)(2).

[25] "[C]lause (A)" refers to

> all individuals receiving aid or assistance under any plan of the State approved under * * * part A [AFDC] or part E [Foster Care and Adoption Assistance] of subchapter IV of this chapter * * *, or with respect to whom supplemental security in-

> (i) shall not be less in *amount, duration, or scope* than the medical assistance made available to any other such individual * * *.

See also 42 C.F.R. 440.240. The court of appeals itself held, somewhat quixotically, that the State's proposal was in "the best interests of Tennessee Medicaid recipients" (Pet. App. A16), and consistent with Section 1902(a)(19) of the Act, 42 U.S.C. 1396a(a)(19).[26] Finally, the regulations implementing the Act also permit a state agency to "place appropriate limits on a service" (42 C.F.R. 440.230(d)), so long as the service provided is "sufficient in amount, duration, and scope to reasonably achieve its purpose" (*id.* § 440.230(b)).[27]

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come benefits are being paid under subchapter XVI [SSI] of this chapter * * *.

Respondents claim that Tennessee has discriminated against the blind and the disabled (a subclass of SSI recipients) by offering them medical assistance *equal* "in amount, duration, [and] scope" to that offered other Medicaid recipients (AFDC recipients and aged SSI recipients).

[26] That section provides that

> (a) A State plan for medical assistance must—
>
> * * * * *
>
> (19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients.

[27] The Medicaid Act specifically permits a number of other cost-cutting approaches whose effect on the blind and disabled would be more severe than Tennessee's proposal. One is the "Section 209(b) option," which would permit a state to cover fewer of the blind and disabled than are eligible for SSI. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 38-39 (1981); 42 U.S.C. 1396a(f). The Act also makes it possible for a state to drop the disabled entirely from the covered group of medically (as opopsed to categorically) needy. 42 U.S.C. (Supp. V) 1396c(a)(10)(C); H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 970-971 (1981). (For a discussion of the distinction between the categorically and the medically needy, see *Schweiker* v. *Gray Panthers*, 453 U.S. at 37.)

Other courts have concluded that similar (and even shorter) annual limits on hospital care are consistent with the Medicaid Act. See, *e.g.*, *Charleston Memorial Hospital* v. *Conrad*, 693 F.2d 324, 329-330 (4th Cir. 1982) (inpatient hospital days limited to 12); *Virginia Hospital Ass'n* v. *Kenley*, 427 F. Supp. 781 (E.D. Va. 1977) (inpatient hospital days limited to 21); cf. *Curtis* v. *Taylor*, 625 F.2d 645, 653, modified, 648 F.2d 946 (5th Cir. 1980) (reduction in coverage of physician visits to three per month). Such limits are permissible, the courts have held, so long as the "state plan will meet the medical needs of 'most' eligible Medicaid recipients." *Charleston Memorial Hospital* v. *Conrad*, 693 F.2d at 330. Here the district court found that the state plan would fully serve 95% of even handicapped Medicaid eligibles (Pet. App. A34 n.6). For that reason the Health Care Financing Administration has approved Tennessee's 14-day limit.[28] Similar annual limits are currently in effect in nine other states.[29]

To conclude: whether respondents have shown a prima facie case of disparate impact depends on the nature of the benefit Tennessee has allegedly distributed in unequal fashion. Section 504, however, is not an independent source of law that defines what benefit a recipient of federal funds must offer. Instead, it directs that the handicapped be afforded an equal opportunity to share in whatever benefit a recipient's program, as subsidized by the federal grant statute, happens to provide. Here Tennessee law, in conformity with the Medicaid Act and its regulations, has chosen to offer a limited amount of health

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[28] We have reproduced at App., *infra*, 1a-4a, a copy of the August 25, 1981 Notice of Approval and Attachment 3.1.A.1. (The "Subject of Amendment" in the Notice (App., *infra*, 2a) includes an ellipsis. The full title of the subject is "Inpatient hospital services other than those provided in an institution for mental diseases or tuberculosis." We have appended at App., *infra*, 5a-9a, a September 26, 1983 Notice which makes this clear.)

[29] We have reproduced at App., *infra*, 10a, a list of those states and their annual limits. The source of this information is LaJolla Management Corporation, *Analysis of State Medicaid Program Characteristics, 1983*, at 47-48 (Dec. 1983).

services (not satisfaction of health needs) on equal terms to all individuals eligible for Medicaid. In the distribution of that benefit there is no disparate impact on the handicapped.

B. Section 504 Should Not Be Read As Requiring The State To Distribute Program Benefits In A Way That Produces Equality Of Results

One might attempt, even accepting all we have said thus far, to defend the court of appeals' decision on a more sophisticated level. The court did not, after all, say that the State had to take money allocated for hospital care and spend it for some unrelated benefit. Instead the court sought out the underlying purpose of hospital care —"good health" (Pet. App. A22)—and required that the handicapped be assured of the same success rate as the nonhandicapped in achieving that purpose (Pet. App. A12 n.8). Its assumption seems to have been that Section 504 leaves a recipient free to choose the purpose of its program, but requires that the available funds be allocated so as to create equality of results with respect to that ultimate or fundamental purpose.

We do not think that Section 504 can bear such a reading. Section 504 was designed simply to eliminate discrimination against the handicapped, not to require the creation of subsidy (or affirmative-action) programs which will produce equality of results for them. The court of appeals' approach has the effect of dissolving all distinctions between nondiscrimination on the one hand, and subsidy or affirmative action on the other. Section 504 should not be read to obliterate the commonly understood conceptual categories against which it was enacted and which serve to make meaningful its animating concerns. Further, the court of appeals' approach reads Section 504 as requiring the State to engage in a significant redistribution from the nonhandicapped to the handicapped, a result that should not be required in the absence of a clear indication of congressional intent. Finally, the court's approach, by requiring the State to

apportion Medicaid funds to achieve equal results for the handicapped and the nonhandicapped, may produce new inequalities affecting other protected groups. These consequences of the court's approach are not supported by the case law dealing with Section 504 and cognate statutes.

1. *The Court Of Appeals' Approach Obliterates The Distinction Between Nondiscrimination And Affirmative Action, Requires Unforeseen Subsidies, And Produces New Disparate Impacts Of Its Own*

a. Congress does not legislate in a vacuum. When it enacts statutes such as Section 504, which refer to concepts such as discrimination, it must be taken to refer to conceptual categories that have some commonly understood meaning. The fundamental problem with the court of appeals' approach is that it ascribes to Congress a reductionist intention to obliterate these conceptual meanings and to dissolve the distinctions that flow from them.

One common assumption—confirmed by the functioning of our markets—is that a person who offers the same goods and services at the same price to all customers is treating all customers equally (is not *discriminating* against any of them) even though the satisfaction that the same goods will create in individual customers may vary. If a hospital offers everyone health care at $ *X* per day, it is treating everyone equally, and there is no discrimination even if some people need care more than others. Society may then decide that people who are in greater need of hospital care should be provided with lower-priced (or free) care, but that is thought of as a question of subsidy, not a question of how to eliminate discrimination. In just the same way, once society has decided to subsidize a limited amount of hospital care for a group of people, it cannot be thought to *discriminate* if it leaves all of them subject to the identical limit (and thus subject to the market for their unmet needs), even though some may have greater needs than others.

If one accepts the court of appeals' hypothesis that the underlying purpose of Tennessee's plan is good health,

and that any benefit package giving the handicapped a lower success rate in achieving that result has a disparate impact, the real issue becomes not whether Tennessee can reduce its hospital coverage from 20 to 14 days, but whether it can impose *any* annual limit on coverage. The reason is that although the number of handicapped needing further hospitalization decreases with more coverage, the disproportion in "cures" between handicapped and nonhandicapped actually *increases* as the maximum stay period is lengthened (J.A. 182-183).[30]

It would of course be possible to avoid all such "disparate impacts" by providing 365 days of hospital coverage. Then everyone would be offered the same benefit, and the handicapped and nonhandicapped would have their needs met in equal fashion. Yet even the court of appeals agreed that "[t]he State * * * was justified in attempting to reduce its Medicaid expenses" (Pet. App. A13). The only other possible solution that satisfies the "purpose" identified by the court of appeals is to redistribute the funds available for hospital care by giving more per capita to the handicapped, so that equal percentages of the handicapped and nonhandicapped may achieve the goal of good health. This converts Section 504 from an antidiscrimination statute into an instrument of affirmative-action redistribution. No matter how wise or humane this may be as a matter of social policy, it would be unwarranted to read such a policy into the sparse and limited language of Section 504.

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[30] For example, while 3.5 times as many handicapped as nonhandicapped Medicaid-eligible hospital users (27.4% ÷ 7.8%) require more than 14 days of hospitalization, 4.02 times as many (16.9% ÷ 4.2%) require more than 19 days. We illustrate in App., *infra*, 11a, that this proposition is true for every increase in coverage from one to 19 days. Although there are no figures to show the relative rates of utilization for exactly 20 days, the parties stipulated that they did "not have any information that would indicate that patterns of patient utilization of twenty days coverage per year differ significantly from patterns of utilization of fifteen to nineteen (15-19) days of hospitalization per year" (J.A. 40). The figures given in App., *infra*, 11a, are taken from J.A. 182-183.

b. To read Section 504 as animated by the general underlying purpose of producing equality of results might have the untoward consequence of creating (or increasing) disparate impacts (so conceived) with respect to other groups, some themselves protected by antidiscrimination laws.

We start here with the fact that the handicapped as a class *already* receive proportionately more of the State's Medicaid assistance—including hospital care—than do the nonhandicapped as a class. A greater proportion of handicapped than nonhandicapped persons is eligible for Medicaid benefits in the first place, because persons between 21 and 65 (with no dependent children) cannot qualify for Medicaid coverage (regardless of income) unless they are either blind or disabled. Further, of those eligible for Medicaid, a greater proportion of the handicapped than of the nonhandicapped receives inpatient hospital care. See note 5, *supra*. Finally, of those who receive inpatient hospital care, a greater proportion of handicapped than of nonhandicapped persons uses the full 14 days of care offered under the State's plan. See page 3, *supra*, and App., *infra*, 11a.

The court of appeals' approach would require increasing these disproportions. But if the State must pay still more money per capita annually for hospital care for the blind and disabled, it will necessarily pay less for AFDC recipients. See page 6, *supra*. And if in Tennessee, as in Texas, "the proportion of AFDC recipients who are black or Mexican-American is higher than the proportion of the * * * blind, or disabled welfare recipients who fall within these minority groups" (*Jefferson* v. *Hackney*, 406 U.S. 535, 538 (1972)), respondents' proposal might be considered to have a "disparate impact" on those protected by Title VI.

Making results rather than benefits the focus for identifying disparate impact would have similar consequences outside the area of health care. Consider, for example, the question of federal financial aid to elementary and secondary schools. See, *e.g.*, 20 U.S.C. 2701 *et seq.*;

20 U.S.C. 3801 *et seq.* One might say that the underlying purpose of such school programs is not the provision of educational services, but the successful achievement of learning—measured perhaps by SAT scores. One could then claim that such a program had a disparate impact on the mentally handicapped if funds were not so allocated as to bring their SAT scores into parity with those of the nonhandicapped.[31] But a redistribution of this sort—what in common understanding would be regarded as affirmative action in favor of the handicapped—may very well have a disparate impact on disadvantaged (but nonhandicapped) minorities protected by Title VI.

Indeed, even a system of direct cash grants in equal amounts to all individuals below a certain income level could be suspect under Section 504, provided one defined the purpose of the grants in sufficiently general result-oriented terms—to promote health or learning. And since the class protected by Section 504 is not necessarily congruent with the classes protected by Titles VI and IX, a redistribution of funds to help the handicapped better achieve the program's "purpose" would often create new disparate impacts of its own.[32]

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[31] The suggestion is not fanciful. One might sensibly object that the goal of equal SAT scores is naturally impossible for some children to reach, and that Section 504 does not require pointless expenditures. But in the same way the goal of good health ("the best cure" (Pet. App. A12 n.8)) is unattainable for some of the physically handicapped. Yet what the court of appeals' decision requires is that the handicapped as a class make the same progress toward that goal (have their medical needs met at the same rate) as the nonhandicapped as a class.

[32] As even the court of appeals acknowledged (Pet. App. A13), the State is entitled to "a great deal of latitude in structuring the services it provides to its citizens." See also *Beal* v. *Doe*, 432 U.S. 438, 444 (1977) (the Medicaid Act "confers broad discretion on the States to adopt standards for determining the extent of medical assistance"); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). "Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. * * * [T]his Court has never held[] that discrimination must always be inferred from such consequences." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n.20 (1978) (emphasis in original).

2. *The Cases Do Not Support The Conclusion That Inequalities In Result Automatically Constitute A Disparate Impact*

The cases decided by this Court and other courts under Section 504 do not support the approach taken by the court of appeals. In *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the issue was not whether the respondent got equal "benefits" from a federally assisted nursing program, but whether she was "qualified" to "participat[e] in" the program at all (29 U.S.C. 794). In answering that question, however, this Court assumed that it should measure discrimination in the context of the program as the recipient of federal assistance defined it[33] (442 U.S. at 413 n.12):

> Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State.

To the argument that the respondent could benefit from (and perhaps even be licensed after completing) a suitably modified program, the Court responded (442 U.S. at 410):

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. * * * * * * Section 504 does not refer at all to affirmative action. * * * Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.

In the cases relied upon by the court of appeals (Pet. App. A7-A10), where a disparate impact was found, the very benefit offered by the recipient reached the protected

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[33] See also *Timms* v. *Metropolitan School District of Wabash County*, 722 F.2d 1310, 1318 (7th Cir. 1983) ("[S]ection 504 forbids exclusion from programs rather than prescribing the programs' content.").

group in disproportionately small numbers.[34] Those cases therefore involved issues like that presented by architectural and transportation barriers. When a recipient of federal education aid provides a classroom or a library with no access ramp, it offers a benefit that—unlike Tennessee's hospital care—does not reach relatively equal numbers of the handicapped and nonhandicapped. The same is true when the recipient constructs a public transportation system with federal money, but designs it in a way that bars use by the handicapped.[35]

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[34] In *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981) (en banc), the claim was that the recipient, by relocating a hospital, had made it more difficult for the handicapped and minorities to get to the facility. The court assumed, "without deciding, that the plaintiff [had] presented a prima facie case" under Title VI, and went on to hold that the recipient had adequately justified whatever burden it imposed on the protected group. 657 F.2d at 1324, 1333-1337. In *Bryan* v. *Koch*, 627 F.2d 612, 616-617 (2d Cir. 1980), the claim was that New York City, by offering hospital care only outside central Harlem, would fail to serve the black and hispanic patients who lived there. The court concluded that the plaintiffs had made a prima facie showing of disparate impact under Title VI, but that the City had adequately justified its decision. 627 F.2d at 616-620.

[35] See, *e.g.*, *Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); but cf. *American Public Transit Ass'n* v. *Lewis*, 655 F.2d 1272, 1278 (D.C. Cir. 1981).

In *Georgia Association of Retarded Citizens* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983) (*GARC*), a class of mentally retarded children raised claims under both Section 504 and the Education of the Handicapped Act, 20 U.S.C. 1401 *et seq.* (EHA), challenging the defendants' policy of refusing to consider providing education in excess of the traditional 180-day school year to handicapped children. Although the court did not analyze the plaintiffs' Section 504 claim in terms of "disparate impact," they alleged, in essence, that the 180-day limitation—although applied across the board to all school children—had a disparate impact on the severely and profoundly mentally retarded, who regressed as a result of the three-month summer break in their training. Such children, the plaintiffs argued, were therefore not provided an equal opportunity to benefit from their educational programs. The Eleventh Circuit sustained this claim.

We argued in the court of appeals (716 F.2d at 1580 n.15), and continue to believe, that the Section 504 holding in *GARC* is inconsistent with this Court's decision in *Southeastern Community Col-*

The point can perhaps best be illustrated by Aesop's fable about the fox and the stork. Section 504 is violated if a recipient offers the fox and the stork an equal amount of milk in a container only the stork can drink from. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). But if an equal amount of milk is offered in a container accessible to both, there is no discrimination under Section 504 even though the fox, in order to be healthy, needs more milk than the stork.

This Court has twice considered the issue of disparate impact under Title VI. In *Guardians Association*, *supra*, the use of an unvalidated written examination and a seniority system for layoffs caused minority candidates to be hired later and laid off sooner, so that proportionately fewer blacks and Hispanics than whites enjoyed the benefits of employment in a federally funded program. The case thus fits comfortably into the category of situations where the very benefit being offered by a recipient of federal funds is less accessible to the protected group than to others.

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court found that the use of English as the sole language for instruction had the effect of denying non-English-speaking Chinese children the benefits of public education (414

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lege v. *Davis*, 442 U.S. 397 (1979). *GARC* is in any event different from this case in one critical respect. The federal funds involved there included monies provided under the EHA for the purpose of providing each handicapped child with a "free appropriate public education" (20 U.S.C. 1412(1)), a purpose that requires consideration of the "unique needs" of each such child. 20 U.S.C. 1401(16) and (18). And as we pointed out above (pages 12, 18-21, *supra*), although Section 504 does not dictate the kinds of benefits a recipient may offer, such obligations may be imposed by the federal funding statute itself and the funding agency's regulations. For that reason the Section 504 regulations governing public education programs receiving aid from the Department of Education incorporate requirements similar to those imposed by the EHA. See 34 C.F.R. 104.33(a) ("free appropriate public education"), 104.33(b)(1) ("appropriate" education is one "designed to meet individual educational needs"). The Section 504 regulations governing recipients of HHS funds for health, welfare, and other social services, by contrast, contain no such requirement that individual needs be considered. 45 C.F.R. Pt. 84, Subpt. F.

U.S. at 568). The Court concluded that the federally funded program or activity was the provision of educational services, and that access to these services was completely cut off to those who were "handicapped" by their failure to speak English. The case thus is clearly analogous to ones where the handicapped are barred from access to a library or school by physical barriers; it nowhere suggests that it is discrimination not to allocate educational services in such a way as to produce equal achievement in learning.[36]

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[36] One can conceive of the benefit being distributed in *Lau* as "instruction-given-in-English" and then assert that Chinese-speaking students were offered that benefit like everyone else. In the same way, one can argue that a rampless library is offering, as a service, "books-in-a-building-without-ramps," and that *that* service is available equally to all; similarly, the fox and the stork do have equal access to the benefit of "milk-in-a-long-necked-container" if that is how one chooses to define the benefit.

The point illustrates that reductionist extensions can be made with equal logic in both directions. Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is "collapsed" into one's definition of what is the relevant benefit. But as the Court assumed in *Davis*, 442 U.S. at 410-411, Congress in Section 504 was legislating against a background in which there is some meaningful commonsense distinction between discrimination on the one hand and affirmative action on the other. To maintain that distinction, some generally understood distinction between what constitutes milk and what constitutes a container must be maintained. It is our submission that, in this case, the "milk" is the provision of inpatient hospital services, not "good health." The handicapped may not be discriminated against with respect to or barred from access to *that* service.

There is an additional difficulty with any suggestion that *Lau* controls this case. The Court there, in defining the school district's obligations, relied primarily on guidelines issued by the funding agency (HEW), which required federally assisted school districts "'to rectify * * * language deficienc[ies] in order to open' the instruction to students who had 'linguistic deficiencies'" (414 U.S. at 567, quoting 35 Fed. Reg. 11595 (1970)). And it is as true under Title VI as it is under Section 504 that "[i]dentification of those instances where a refusal to accommodate the needs of [the protected class] amounts to discrimination against [it] continues to be an important responsibility of HEW." *Southeastern Community College* v. *Davis*, 442 U.S. at 413. As we have already made clear, the concerned agency has found no such problem here.

The claim made by respondents here is not like the claims adjudicated in *Guardians* and *Lau*. Respondents do not contend that they, like employees hired late and dismissed early, receive a proportionately smaller share of the State's program benefits. Nor do they claim that 14 days of care would (like English instruction to Chinese speakers; or like a library without ramps for one in a wheelchair) be wholly ineffective for them. They argue instead that the handicapped, because of their relatively greater medical needs, will not achieve equality of results (in terms of good health) if hospitalization is limited to a maximum of 14 days for all. The solution they propose is an allocation of funds that will give the handicapped (per capita) more than the nonhandicapped —indeed, more than the unequal division the State already provides. This is the very kind of affirmative action that *Davis* held Section 504 does not require.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

CHARLES J. COOPER
Deputy Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MICHAEL CARVIN
Attorneys

MAY 1984

APPENDIX A

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Health Care Financing Administration

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL

FOR: Health Care Financing Administration

Transmittal Number

AT-81-9

State

Tennessee

Program Identification

Title III

TO: Regional Administrator
Health Care Financing Administration
Department of Health and Human Services

Proposed Effective Date

Item #1. (a)—September 1, 1981

Item #1. (b)—July 1, 1981

Type of Plan Material (Check One)

☐ New State Plan

☒ Amendment to be Considered as New Plan

☐ Amendment

Complete Next 4 Blocks if This is an Amendment
(Separate transmittal for each amendment)

Federal Regulation Citation

42 CFR 440.10

Number of the Plan Section or Attachment

Attachment 3.1.A.1, Page 1

Amend item #1. (a) and (b)

Number of the Superseded Plan Section or Atachment

Attachment 3.1.A.1, Page 1

item #1

Subject of Amendment

Limitation on Amount, Duration and Scope of Medical Care and Services Provided—Inpatient Hospital . . . . tuberculosis.

Governor's Review (Check One)

☒ Governor's Office Reported No Comment

☐ Comments Of Governor's Office Enclosed

☐ No Reply Received Within 45 Days Of Submittal

☐ Other, As Specified:

Signature of State Agency Official

Typed Name:

Eugene W. Towinkle, M.D.

Title:

Commissioner

Date:

July 7, 1981

Return To:

Anna D. Boswell
Medicaid Program Relations
283 Plus Park Blvd.
Nashville, Tennessee 37217

For Regional Office Use Only

Date Received 7/29/81

Date Approved 8/25/81

Plan Approved—One Copy Attached

Effective date of Approved Material

Item 1(a)—September 1, 1981

Item 1(b)—July 1, 1981

Signature of Regional Official

/s/ Richard L. Morris

Typed Name:

Richard L. Morris

Title:

Associate Regional Administrator
Division of Program Operations

Remarks:

Attachment 3.1.A.1
Page 1

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State

Tennessee

LIMITATION ON AMOUNT, DURATION AND SCOPE OF MEDICAL CARE AND SERVICES PROVIDED

1. Inpatient hospital . . . tuberculosis
   (a) Limited to 14 days per fiscal year, effective September 1, 1981.
   (b) Friday or Saturday admissions limited to emergencies or surgery the same or next day.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Health Care Financing Administration

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL

FOR: Health Care Financing Administration

TO: Regional Administrator
Health Care Financing Administration
Department of Health and Human Services

Transmittal Number

AT-83-10

State

Tennessee

Program Identification

Title XIX

Proposed Effective Date

September 1, 1983

Type of Plan Material (Check One)

☐ New State Plan

☒ Amendment To Be Considered As New Plan

☐ Amendment

Complete Next 4 Blocks if This is an Amendment
(Separate transmittal for each amendment)

Federal Regulation Citation

42 CFR 440.10, 42 CFR 440.40

Number of the Plan Section or Attachment

Attachment 3.1.B.1; Item 1

Attachment 3.1.A.1; Item 1

Attachment 3.1.A.1; Item 4.b.

Attachment 3.1.B.1; Item 4.b.

Number of the Superseded Plan Section or Attachment

Attachment 3.1.B.1; Item 1

Attachment 3.1.A.1; Item 1

Attachment 3.1.A.1; Item 4.b.

Attachment 3.1.B.1; Item 4.b.

Subject of Amendment

Inpatient Hospital Services Other Than Those Provided in an Institution for Mental Diseases or Tuberculosis Early and Periodic Screening and Diagnosis of Individuals Under 21 Years of Age . . .

Governor's Review (Check One)

☒ Governor's Office Reported No Comment

☐ Comments Of Governor's Office Enclosed

☐ No Reply Received Within 45 Days Of Submittal

☐ Other, As Specified:

Signature of State Agency Official

/s/ James E. Word

Typed Name:

James E. Word

Title:

Commissioner

Date:

September 20, 1983

Return To:

Sheron B. Doss
Medicaid Auxiliary Unit
283 Plus Park Blvd.
Nashville, Tennessee 37217

For Regional Office Use Only

Date Received 9/22/83

Date Approved 9/26/83

Plan Approved—One Copy Attached

Effective Date of Approved Material 9/1/83

Signature of Regional Official

/s/ Richard L. Morris

Typed Name:

Richard L. Morris

Title:

Associate Regional Administrator, Reg. IV

Remarks:

Attachment 3.1.A.1

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State

Tennessee

LIMITATION ON AMOUNT, DURATION AND SCOPE OF MEDICAL CARE AND SERVICES PROVIDED

1. Inpatient Hospital . . . . tuberculosis

(a) Limited to 14 days per fiscal year with the following exceptions:

(1) Infants with a birth weight of 3000 grams or less may receive up to twenty (20) days at the time of birth if identified as eligible for EPSDT Services and are in a recognized Neonatal Intensive Care Unit. Future hospital services for such infants will be on the same basis as other recipients.

(2) Individuals may also receive up to twenty (20) days if they are eligible for EPSDT services and the Department determines, after consultation with qualified experts, that the following conditions are met:

(i) the individual's condition is surgically correctable, was present at birth and is the result of faulty embryogenesis; and

(ii) the proposed procedure is medically necessary and efficacious; and

(iii) the proposed procedure is expected to prolong life expectancy or improve the quality of life.

(b) Friday or Saturday admissions limited to emergencies or surgery the same or next day.

September 26, 1983

Refer to:
DPO/SCOB/0M

Mr. James E. Word, Commissioner
Department of Health and Environment
344 Cordell Hull Building
Nashville, Tennessee 37219

Attn: Sheron Doss

Re: Tennessee Title XIX Plan Transmittal 83-10

Dear Commissioner Word:

We have completed our review of the above referenced plan amendment. We are pleased to inform you that this amendment to your Title XIX State Plan has been approved as submitted.

Sincerely,

Richard L. Morris
Associate Regional Administrator
Division of Program Operations

HCFA:DPO:SCOB:JMcClain:mh:9/27/83

APPENDIX B

Besides Tennessee, nine states limit the number of days of Medicaid coverage for inpatient hospital services per year.

State	Days Per Year
Florida	45
Idaho	40
Maine	30
Mississippi	30
Georgia	25
West Virginia	20
Alabama	15
Oregon	14
South Carolina	12

Six other states limit the number of reimbursable days per admission, per spell of illness, or per benefit period.

State	Reimbursable Days
South Dakota	60 days/benefit period
Ohio	30 days/spell of illness
Texas	30 days/spell of illness
Maryland	20 days/spell of illness
Kentucky	14 days/admission
Oklahoma	10 days/admission (with minimum of 20 days between discharge and readmission)

APPENDIX C

Comparison of handicapped (H) and nonhandicapped (NH) Medicaid-eligible hospital users requiring more inpatient hospital care than would be provided by ceilings of under 20 days per year on Medicaid coverage

Ceiling	Nonhandicapped (NH) (Total: 34,288)		Handicapped (H) (Total: 16,852)		% H ÷ % NH
	Number	Percent	Number	Percent	
1	30,711	89.6	15,907	94.4	1.05
2	23,097	67.4	14,552	86.4	1.28
3	17,310	50.5	13,243	78.6	1.56
4	13,838	40.4	11,987	71.1	1.76
5	11,195	32.6	10,858	64.4	1.98
6	9,095	26.5	9,820	58.3	2.20
7	7,497	21.9	8,827	52.4	2.39
8	6,315	18.4	7,974	47.3	2.57
9	5,375	15.7	7,301	43.3	2.76
10	4,623	13.5	6,629	39.3	2.91
11	4,000	11.7	6,077	36.1	3.09
12	3,474	10.1	5,584	33.1	3.28
13	3,045	8.9	5,088	30.2	3.39
14	2,662	7.8	4,617	27.4	3.51
15	2,370	6.9	4,224	25.1	3.64
16	2,072	6.0	3,835	22.8	3.80
17	1,821	5.3	3,481	20.7	3.91
18	1,615	4.7	3,153	18.7	3.98
19	1,429	4.2	2,844	16.9	4.02

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 556